Supreme Court, U. S.
FILED
DEC 21 1979
MICHAEL RODAK, JR., CLERK

No. 79-485

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

ELI LILLY AND COMPANY,
Petitioner

v.

DOUGLAS M. COSTLE, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

REPLY BRIEF FOR PETITIONER ELI LILLY AND COMPANY

DOUGLAS E. KLIEVER
CHARLES F. LETTOW
JOHN S. MAGNEY
WILLIAM N. HALL
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

JOHN C. JENKINS
307 E. McCarty Street
Indianapolis, Indiana 46206

Counsel for Petitioner
Eli Lilly and Company

Of Counsel:

CLEARY, GOTTLIEB, STEEN &
HAMILTON
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

December 21, 1979

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-485

ELI LILLY AND COMPANY,
Petitioner

v.

DOUGLAS M. COSTLE, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

REPLY BRIEF FOR PETITIONER ELI LILLY AND COMPANY

The petition for writ of certiorari presents three important questions. The first is the obligation of an agency under Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553, to provide notice and opportunity for public comment before promulgating final regulations which differ substantially from the initial proposal and which are premised on a new and more extensive base of data. The second and third issues assume that notice and opportunity for comment is not required, and focus on the appropriate role of the reviewing court in such a case. Pet. at 2.

Respondent ("EPA") barely mentions the latter two issues relating to whether the First Circuit impermissibly substituted its judgment for that of EPA contrary to this Court's decision in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333-34 (1976). EPA addresses just one of the numerous instances in which the First Circuit substituted its judgment for that of the agency: the First Circuit's conclusion, after an independent *de novo* review of the record, that petitioners had not carried their heavy burden of persuading the First Circuit that critical data reported by EPA's contractor (ESE) were invalid. Resp. Br. at 10.

EPA here seeks to convey the impression that it reviewed the ESE data and concluded that they were valid and that the First Circuit's independent *de novo* review was the result of unnecessary judicial prudence. Resp. Br. at 10. EPA did not make, and could not have made, a determination as to the reliability of the ESE data because the laboratory documents necessary for that determination were not turned over to EPA by ESE until after oral argument before the First Circuit. 598 F.2d at 646; Pet. App. A, 16a. The First Circuit also found the briefs and supplemental memorandum of agency counsel to be an inadequate explanation of the technical and scientific issues raised by the petitioners. *Id.* at 649; Pet. App. A., 22a.

It was in the *absence of any EPA determination* on this and other central issues that the First Circuit proceeded to substitute its judgment for that of EPA by engaging in an independent *de novo* review of the record or by making "assumptions" that EPA had rationally resolved issues when there was no evidence in the record that EPA had even considered the issues.

EPA concludes that the First Circuit's mode of review "comports fully with the standards established in *Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402

(1971)." Resp. Br. at 10. In *Overton Park*, the Court established a standard of judicial deference to judgments made by the agency in the administrative process because a contrary standard would result in the substitution of the reviewing court's judgment for that of the agency. The Court cautioned that agency judgments made outside of the usual administrative process—for example, additional findings requested by a reviewing court—should not be accorded that deference. 401 U.S. at 420. Here there were no agency judgments on the critical issues to which the First Circuit could defer.[1] The First Circuit, contrary to the Court's decision in *Transcontinental Gas Pipe Line*, simply injected itself into the administrative process by substituting its judgment for that of EPA.

The First Circuit placed itself in the position of substituting its judgment for that of EPA by deciding to review the regulations on the basis of a record incompletely tested by exposure to public comment under the APA. EPA's argument, in response to the first issue presented by the petition, that it complied with the APA appears principally aimed at creating the illusion that the notice-and-comment issue is "fact bound". Resp. Br. at 5.[2]

---

[1] Eli Lilly does not construe EPA's argument as suggesting that a reviewing court should accord judicial deference to factual arguments made for the first time by agency counsel in briefs. Any such suggestion of judicial deference to the *post hoc* rationalizations of agency counsel would be contrary to decisions of this Court and the courts of appeal. *E.g.*, *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-69 (1962); *Dry Color Manufacturers' Ass'n* v. *Department of Labor*, 486 F.2d 98, 104 n. 8 (3d Cir. 1973).

[2] In several instances, EPA includes misleading statements of the facts. For example, EPA indicates that Eli Lilly stated that its waste water discharge complies with the final regulations. Resp. Br. at 9. Eli Lilly has made no such statement. *See* Pet. at 20-21, n. 9. As pointed out by Eli Lilly, the First Circuit rejected the argument that the ESE data excluded waste water which bypassed Eli Lilly's carbon system because of the ambiguity of the

Quite to the contrary, this case presents a clear issue of law on which the decision of the First Circuit is in conflict with decisions in the Second, Fourth, and District of Columbia Circuits.[3] EPA made major changes in the regulations and made those changes based upon its assessment of a greatly expanded base of data. EPA emphasized these "major changes" and how its "expanded data base" had led it to the critical inferences underlying the major changes in the regulations. Pet. App. C., 63a-67a, 87a-89a; Pet. at 10-11.[4]

---

record before it. 598 F.2d at 653; Pet. App. A, 31a. Had EPA issued a notice for further public comment on its expanded data base and indicated that it planned to use the Eli Lilly data as a base for substantially amending the first-stage regulations (rather than using the data in connection with future second-stage regulations as Eli Lilly understood), Eli Lilly would have had an opportunity to clarify the record. Pet. at 20-21, n. 9.

[3] EPA seeks to distinguish *National Crushed Stone Ass'n* v. *Environmental Protection Agency*, 601 F.2d 111 (4th Cir. 1979), petition for cert. filed (No. 79-770, Nov. 15, 1979), on the ground that the undisclosed data in this case "were not open to serious question." Resp. Br. at 9. EPA is in error. The sole difference between this case and *National Crushed Stone* is that the Fourth Circuit, upon determining that important data had not been subject to public comment, remanded the regulations to EPA for further consideration in accordance with the APA. The First Circuit, in contrast, held that the APA did not require remand and engaged in a "partial and facial" independent review of the record leading to an uncertain conclusion as to the validity of the data. 598 F.2d at 649-50; Pet. App. 23a-24a. In discussing *Weyerhauser Corp.* v. *Costle*, 590 F.2d 1011 (D.C. Cir. 1978), EPA overlooks, as did the First Circuit, the fact that the District of Columbia Circuit specifically held that the Agency had not complied with the APA because certain important conclusions reached by EPA "must be validated, if at all, by reference . . . to certain data . . . obtained by the Agency after the opportunity for public comment had lapsed . . . ." *Id.* at 1030.

[4] The table in which Eli Lilly illustrated the magnitude of the change from interim final to final regulations (Pet. at 11) contains a typographical error. The reduction in the daily maximum effluent limitation for pesticides from the interim final to final regulations was 37 percent rather than 47 percent. The reduction in the 30-day average is correctly stated as 75 percent.

The First Circuit held that public notice and an opportunity to comment on the new data and on the inferences which EPA drew from that new data are unimportant and not required by Section 4 of the APA. 598 F.2d at 644-45; Pet. App. A, 12a-13a, 15a.

That decision of the First Circuit is incorrect and this Court should grant the petition for certiorari in order to resolve the conflict of decisions among the courts of appeals and provide guidance to the courts of appeals and to the administrative agencies on important issues of administrative law.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

DOUGLAS E. KLIEVER
CHARLES F. LETTOW
JOHN S. MAGNEY
WILLIAM N. HALL
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

JOHN C. JENKINS
307 E. McCarty Street
Indianapolis, Indiana 46206

Counsel for Petitioner
Eli Lilly and Company

Of Counsel:

CLEARY, GOTTLIEB, STEEN &
HAMILTON
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

December 21, 1979